IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEALNO. 5 of 1991

1. Datta Dynanu Kashid

since deceased by his heirs

1A Smt.Hirabai Dattu Kashid

1B Raghunath Dattatraya Kashid

1C Smt Pramila Shrikant Kashid

1D Kum.Swati Shrikant Kashid

1E Kum Minkashi Shrikant Kashid

1F Aparna Shrikant Kashid ....Appellants

(Orig.Plffs)

V/s

1. Shri Bapu Bandu ambi

2. Shri Shankar Bandu Ambi

3. Balu Bandu Ambi

4. Shri Raghunath Bandu Ambi

5. Smt.Sundrabai Bandu Ambi

6. Rukmini Bandu Ambi

@ Sou.Rukmini Appasaheb Ambi

7. Sushila Bandu Ambi

@ shishila Bapu Ambi

8. Ratna Bandu Ambi

@ Sou. Ratna Sadashiv Ambi .. Respondents

(Orig.Defts)

Shri S.G.Deshmukh for Appelants

Shri Deepak R. More for Respondents

CORAM:S.R.SATHE,J.

DATED: 7th Sept. 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of the 2nd Additional District Judge, Sangli in Regular Civil Appeal No.245 of 1983 whereby the judgment and order passed by the Court of the Civil Judge, S.D., Sangli in Regular Civil Suit No.227 of 1976, decreeing the plaintiff's suit for redemption of mortgage was set aside and the appeal was allowed and the plaintiff's suit was dismissed, the original plaintiffs have preferred this second appeal. For the sake of convenience hereinafter parties shall be referred to as the plaintiff and defendants.

2. Brief facts giving rise to this second appeal as under :-

3. The suit land bearing Survey No.57/4B admeasuring 30 gunthas was initially owned by Bandu Tukaram Ambi and plaintiff's father had purchased it by sale deed dated 9-6-1956. Defendant nos 1 to 3 and 5 to 8 are sons and daughters of Bandu T. Ambi, while defendant no.4 is the wife of deceased Bandu T. Ambi. After the death of plaintiff's father partition took place between the plaintiff and his brother and suit land came to the share of the plaintiff. Thereafter he mortgaged the said

property with Bandu by executing mortgaged deed dated 5-4-1965. As per terms and conditions of the said deed it was agreed to get the mortgage redeemed after 5 years from the date of agreement and within 7 years from the date of mortgage on any day in the month of April. Accordingly plaintiff issued notice dated 26-4-1972 to the defendants and called upon them to remain present in the office of the Sub Registrar, Sangli for executing reconveyance deed in plaintiff's favour.

4. The land bearing Survey no.57/4A was initially owned by Bandu Tukaram Ambi and Laxman Babaji Parit was tenant in the said land. As per proceedings under Section 32G of Bombay Tenancy and Agricultural Lands Act (hereinafter referred to as the Tenancy Act), the said Laxman B. Parit became owner of the said land. In record of rights the land bearing Survey NO.57/4A was shown in the name of plaintiff and land bearing Survey no.57/4B was shown in the name of Laxman B.Parit though possession of 57/4A was with Laxman Parit and Survey No.57/4B was with the plaintiff. As the defendants did not remain present in the office of Sub

Registrar as per notice issued to the defendants, plaintiff filed the present suit for redemption of mortgage and claimed possession.

5. The defendant nos.1 to 4 and 6 to 8 filed their joint written statement at Exh.14 and opposed the suit claim. They admitted their relations with late Bandu T. Ambi, but contended that plaintiff was never the owner of the suit land nor he had mortgaged the said land with the defendants. The defendants further contended that suit land was in fact initially owned by the defendants and it was Nokar Inam Land. Plaintiff was doing money lending business and defendant's predecessor had entered into various transactions in the nature of mortgage with plaintiff. Late Bandu was addict to vices and to meet the said vices he often used to take money by way of loan from plaintiff. According to the defendants original plaintiff and his father Dnyanu D. Kashid mislead the defendants and late Bandu T. Ambi and got the sale deed dated 9-6-1956 executed. So, according to them the said sale deed is void and plaintiff's father has in fact not acquired any right in the suit property. The defendants

further contended that when they came to know about the said transaction they called upon the plaintiff, by letter dated 11-6-1957, to execute the reconveyance deed. Plaintiff also gave reply to the said letter but actually did not execute the reconveyance. On the contrary plaintiff stated that loan that was taken by Bandu was to the extent of Rs.2,000/- and by representing him that sale deed is to be executed, plaintiff got the document in the nature of mortgage executed by deceiving Bandu. There was no reason for Bandu T. Ambi to advance any loan to the plaintiff and to execute the mortgage deed. The defendants further contended that when they received notice from the plaintiff they had been to the plaintiff but at that time the plaintiff told them that as it was necesasry to issue notice it has been given, but no action would be taken on the same and as such the defendants kept mum. The defendants further contended that when the alleged sale deed dated 9-6-1956 was executed Bandu T. Ambi was not the exclusive owner of the said property, and as such the said transaction was not legal. Hence on all these grounds the defendants prayed for dismissal of the suit.

6. On these pleadings the learned trial Court framed issues at Exh.15. After considering the evidence adduced by both the parties the trial Court came to the conclusion that the defendants have failed to prove that the father of the plaintiff had represented the defendants and got the sale deed dated 9-7-1956. The trial Court also held that the document dated 5-4-1965 is a mortgage deed and plaintiff is entitled for redemption of mortgage. The trial Court therefore passed a decree in plaintiff's favour. The said decree was challenged by the defendants in the first appellate court and the first appellate found that appreciation of evidence by the trial Court was not correct and the defendants had in fact proved that the transaction dated 5-4-1965 was of the sale and plaintiff had got document of mortgage deed executed by deceiving the defendants . The first appellate Court therefore allowed the appeal and dismissed plaintiff's suit.

7. The original plaintiffs have challenged the order passed by the first appellate Court in this appeal. At the time of admission of this

appeal, this court has passed the following order.

. "Admit. Nature and effect of document dated 5-2-1965 styled as mortgage deed would be the susbtantial question of law involved in this appeal".

8. In this appeal before me Shri S.G.Deshmukh, learned advocate for the Appellant original plaintiff has urged two points. Firstly, he submitted that without there being any evidence on record the first appellate Court has wrongly held that defendants have proved that the document dated 5-4-1965 was got executed by deception and the same is not mortgage deed. Secondly, he canvassed before me that the defendants were not entitled to raise any contention about the sale deed dated 9-6-1956 and the appellate Court erred in holding that the said transaction was not of sale. He also canvassed before me that there was enough oral and documentary evidence to indicate that the transaction dated 5-4-1965 was of mortgage and as such the appeal be allowed and decree for redemption of mortgage be passed in favour of

the plaintiff.

9. As against this, Shri Deepak More, learned Advocate for the Respondents-defendants supported the judgment and order passed by the first appellate Court.

10. From the pleadings of the parties as well as the evidence on record it is very clear that the execution of the document dated 9-6-1956 is not in dispute. The only question is whether that said transaction was of sale out and out or whether it was a mortgage or a document executed by way of security and the plaintiff's father had agreed to reconvey the property. It is the contention of the defendant that plaintiff's father by deceiving the defendant and taking undue advantage of the defendant's position got the sale deed executed. Naturally, the burden was on the defendant to prove the said allegation. However, we find that defendant has in fact failed to adduce any independent evidence to show that the plaintiff's father had misrepresented the defendant's father or that sale deed was got executed by undue influence on defendants' father. However, the first

appellate court has also held that document dated 9-6-1956 Exh.75 was not the sale deed but it was executed by way of security. I really fell to understand on what basis such conclusion has been arrived at by the learned first appellate Court though the document in question is clearly styled as a sale deed and it is a registered document. There is no doubt that defendant can contend that real transaction between the parties was not depicted in the document and for that bring such evidence. There is no bar of Section 91 or 92 of Indian Evidence Act. But then the defendants must adduce very cogent and convincing evidence in that behalf. The bare reading of Exh.75 would first indicate that there was absolutely no such stipulation in the said document as a result of which the plaintiff's father had agreed to reconvey the property to the defendant's father. Nor there is any specific evidence on record to show that there was any separate written agreement executed between the parties as a result of which there was an agreement to reconvey the property. No such agreement is forthcoming from the defendants side. It is true that defendant had adduced evidence to show

that after execution of the said document defendant's father Bandu had sent one letter dated 28-6-1957 and called upon the plaintiff's father to reconvey the property. Copy of the said letter or notice is at Exh.31. The defendant has produced at Exh.32 the letter received from the plaintiff's father. It is on the basis of this letter that the first appellate court has held that the plaintiff's father had admitted that there was agreement regarding reconveyance and not only that but he had shown willingness to perform the contract by executing reconveyance if the payment is made to him on 17-6-1957. It seems that the first appellate court has treated this letter as unequivocal admission of the plaintiff's father to the effect that there was an agreement for reconveyance. In fact if we carefully read the said letter we find that plaintiff's father had on the contrary categorically denied the notice issued by the defendant's father and specifically contended that the said notice is false and incorrect. However, thereafter he had mentioned in the said letter that if at all according to the defendants' father there is any agreement as contended by him then he should

bring that agreement to Sub Registrar's office and show the same to the plaintiff and then in that event the plaintiff's father would execute the reconveyance deed. It would be worthwhile to reproduce the actual words used by the plaintiff's father in the said letter.

11. Besides this it must be also noted that even today we find that defendants have not taken any such action. So, conduct of the defendants in this behalf also clearly indicates that there was absolutely no such agreement as contended by the defendants.

12. There is another aspect of the matter. If really the transaction of the year 1956 would not have been of sale then defendant would not have kept mum for all these years. Admittedly at no point of time the defendants or their father filed any suit for declaration that the said sale deed is not legal and correct or document was got executed by undue influence or fraud. Nor they filed any suit for redemption of mortgage or for getting reconveyance deed executed. So, under such circumstances I have no hesitation to hold that the finding recorded by the first appellate court in this behalf is not legal and correct.

13. From perusal of the judgment of the first appellate Court it is clear that having held that the transaction dated 9-6-1954 was not of sale, the first appellate Court proceeded on the said footing and observed that as a result of the same there was no question of plaintiff mortgaging any property with the defendant. The first appellate court also observed that document dated 5-4-1965 was obtained by plaintiff by deception and misleading the defendant. In fact execution of the said

document is not at all disputed. It is a registered document. It is not the contention of the defendant that same is not executed between the plaintiff and defendants' father. It was therefore necessary for the defendants to adduce cogent evidence to show that the transaction dated 5-4-1965 was not of mortgage or sale with an agreement to reconvey and on that day plaintiff had represented that document of reconveyance was to be executed and as a result of the same the document Exh.29 dated 5-4-1965 came into existence. From perusal of the record it is quite evident that the defendant have utterly failed to adduce any cogent and convincing evidence to prove their contention. On the contrary if we see the document Exh.25 we find that it is styled as Shart Kherdi Khat (----------). Not only that, it also appears from the same that consideration of Rs.2,000/- was taken to meet the other loan. It was agreed that possession of the land was given to the defendants' father Bandu and it was agreed that on plaintiff repaying the amount of Rs.2,000/- after the period of 5 years but before 7 years from the said document the defendant would execute the

reconveyance deed. So from the averments in the said deed it is crystal clear that document in question was nothing but a mortgage and there was a condition to reconvey the property after the period of 5 years and before completion of 7 years, in the month of April. So, under such circumstances the first appellate Court has wrongly held that the transaction dated 5-4-1965 was of sale. An attempt was made on behalf of the defendants to show that financial position of the plaintiff was in fact very sound and there was no reason for them to mortgage the property with the defendants and obtain loan. However, besides the bare word of the defendant, there is no other evidence to show that financial position of the plaintiffs at the relevant time was sound and there was no reason for them to mortgage the property. It is true that there is some evidence which suggests that previously defendant's father had in fact taken some loan from the plaintiff's father but such stray evidence is not sufficient to discard the documentary evidence which is in the form of mortgage deed Exh.25. It must also be noted that if real transaction would not have been of mortgage then certainly plaintiff would not have

issued notice to the defendant to call upon them to execute reconveyance and the defendants would have immediately given the reply to the plaintiff's notice and denied the plaintiff's allegation that the document dated 5-4-1965 was a mortgage deed. But this has not happened. On the contrary in spite of receipt of notice the defendants kept mum. Now they have made an attempt to give some lame excuse for not giving reply but the explanation given by the defendants in that behalf is not at all satisfactory. The trial Court has given much importance to the fact that the plaintiff did not file suit for redemption of mortgage immediately after issuance of notice but when it is very clear that plaintiff's suit was in time it cannot be said that the plaintiffs inaction in not filing the suit immediately is fatal to the plaintiff's case. Once it appears that the defendant has failed to produce cogent evidence to prove the allegations about fraud it must be held that document in question is a mortgage deed and this transaction was in fact of a mortgage and plaintiff is entitled for redemption.

14. In view of above, it is clear that the first appellate court has not properly considered the legal effect of the documents dated 9-5-1954 and 5-4-1965 and as result reached to a wrong conclusion. It is therefore, necessary to interfere with the findings recorded by the first appellate court. Hence the appeal is allowed. The order passed by the first appellate court is set aside and the order passed by the trial Court is restored.

. Under the pecuilar circumstances parties to bear their own costs.

(S.R.SATHE,J.)